IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 1:16CR124
	)	Judge Gerald Bruce Lee
MOHAN L. NIRALA,	)	Trial Date: September 19, 2016
Defendant.	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION
TO SUPPRESS EVIDENCE AND TO DISMISS

COMES NOW The United States of America, through its attorneys, Dana J. Boente, United States Attorney for the Eastern District of Virginia, and Ronald L. Walutes, Jr., Assistant United States Attorney, and Casey Arrowood, Trial Attorney for the National Security Division, and hereby respectfully files this opposition to the defendant's own motion to suppress evidence and to dismiss the case.

1. The defendant, Mohan Nirala, is charged with the unauthorized possession of five documents relating to the national defense. Each of these documents was clearly marked as Top Secret on its face. The documents were properly classified; indeed Nirala himself classified at least one of the documents as Top Secret. All five documents were recovered in Nirala's personal residence, a location not authorized to store classified material relating to the national defense. Nirala never had the authority to declassify a Top Secret document.[1] Each of the five

[1] There is an internal process to declassify a document within the United States National Geospatial-Intelligence Agency (NGA). No document recovered from Nirala's residence had ever been declassified.

classified documents was clandestinely removed from Nirala's place of work in Springfield, Virginia.

2. The first two classified documents were recovered from Nirala's residence during the execution of a federal search warrant by Special Agents with the Federal Bureau of Investigation (FBI). Attachment 1 (Residence Search Warrant). When the agents entered the residence on January 10, 2014, Nirala told them that he did not take work home from his employment as a scientist with the NGA in Springfield, Virginia. He further assured them that there was no classified material in his residence. Attachment 2 (FBI interview, page 2). After the FBI located the classified material inside his residence, Nirala apologized to an FBI agent as they left his residence. Attachment 3.

3. On March 8, 2016, the FBI returned to Nirala's residence to arrest him. Attachment 4 (Arrest Warrant). After the agents repeatedly knocked instructing Nirala to come to the door, Nirala told them to "hold on, hold on." After no further communications from Nirala and despite continued knocking and instructions to open the door, the agents made a forced entry. The entry team consisted of approximately five FBI agents. Upon entering the residence, the agents cleared the first floor and the attached garage before moving to the upstairs and basement. The door to the basement stairs was closed upon entry. Attachment 5 (FBI report).

4. An agent heard a noise in the basement and when they opened the basement door, they located Nirala coming up the stairs with insulation on his clothing. Attachment 6 (photograph of Nirala's clothing). Nirala confirmed that he had heard the agents' knocking, but stated he went instead to the basement to work on his furnace. Because an agent had heard a noise indicative of some movement in the basement, and because Nirala claimed to have been

working on his furnace under these circumstances (creating a concern with a possible gas leak) a protective sweep of the unfinished basement was made to identify the source of the noise and to confirm there was no gas leak. During the protective sweep, a large partially duct taped FedEx box that had apparently fallen over under the basement staircase was located and photographed. Attachment 7 (previous January 2014 search photo showing the unfinished basement) and Attachment 8 (March 8, 2016 photo showing box's location under the stairs). The agents seized the box which they placed in a SCIF while they sought another search warrant. Attachment 9 (Search Warrant for FedEx box). After obtaining the warrant, the agents searched the box in a SCIF and located multiple lengthy Top Secret documents inside the FedEx box. Also recovered inside the FedEx box was Nirala's copy of the 2014 search warrant of his residence. Attachment 10 (Warrant's Return, #5 (last page), item 11). Nirala kept his copy of the FBI's warrant together with additional Top Secret items he had unlawfully removed from NGA.

5. The Grand Jury returned a seven count indictment charging Nirala with five counts of Willful Retention of National Defense Information in violation of Title 18, United States Code, Section 793(e) and two counts of False Statements. Counts 1 and 2 charge Nirala with the unauthorized possession of documents relating to the national defense that were marked Top Secret and Secret. The remaining three counts of espionage, Counts 3 through 5, charge Nirala with the unauthorized possession of additional documents relating to the national defense that were marked Top Secret. These documents were located inside the FedEx box inside Nirala's residence. Nirala is also charged with two further counts of False Statements for the false claim that he took no work home from NGA and that he did not place classified material into unclassified emails. (Counts 6 and 7).

NIRALA'S PERSONALLY FILED MOTION

6. On July 28, 2016, Nirala, without the aid of his three Court appointed counsel, filed a two hundred-and-two page *Franks* motion entitled: "Defendant's Motion to Suppress Evidence and Dismiss the Case and Motion for Lack of Probable Cause." The motion was personally signed by Nirala, but not by any counsel of record.[2]

7. Local Criminal Rule 57.4 addresses the appearance of attorneys and *pro se* parties before the Court. It prohibits the filing of any pleading by foreign attorneys unless signed by counsel admitted to practice before this Court. Rule 57.4 (D)(3). The rule further prohibits ghostwriting and requires all *pro se* party pleadings to contain a certification under penalty of perjury that no attorney has participated in the preparation of filed pleading. Rule 57.4 (M)(2). Nirala's instant pleading lacks any such certification.

8. Nirala is not proceeding *pro se*. There is no hybrid right to self-representation. The Local Rules do not contemplate such an occurrence and the case law does not support it. *Faretta v. California*, 422 U.S. 806, 835 (1975); *United States v. Singleton*, 107 F.3d 1091, 1000-03 (4th Cir. 1997) (affirming District Judge Bryan's refusal to appoint advisory counsel, "the Supreme Court and other courts have at least implied that the right to representation by counsel and the right to self-representation are mutually exclusive, and at least one circuit has held this explicitly)". Interestingly, Alan Yamamoto, one of Nirala's counsel, was the defense counsel involved in *Singleton*.

[2] It was filed upon the suggestion of his counsel with the Court Security Officer to avoid the disclosure of any classified information. It was also originally misfiled using the Magistrate Number from a search warrant.

9. While the lack of a certification bars a perjury charge, Nirala's personally signed filing made in a judicial proceeding is still subject to prosecution pursuant to Title 18, United States Code, Section 1001, which addresses material false statements to the judicial branch. When Nirala states that he was standing at the front door of his residence when the FBI made forced entry (page 50), he is making a material false statement. Having done research into the case law addressing exigent circumstances, he appreciates the legal problem with his flight to the unfinished basement in an effort to hide the box with classified materials (apparently believing the agents had returned to his residence with another search warrant, rather than the arrest warrant they then possessed). Nirala, in writing, tells this Court that he was standing at the front door when the agents made entry. This patently false statement is readily established with five agents who composed the entry team, the written report and warrant affidavit they promptly prepared after this arrest and the photograph of the basement insulation on Nirala's clothing, including a line where his shoulder hit the ceiling of the crawl space under the basement stairs. It also establishes an obstruction of justice enhancement pursuant to the United States Sentencing Guidelines. U.S.S.G. §3C1.1 (2015).[3]

CASE LAW

10. Nirala's filing seeks to convert this criminal prosecution into a forum for him to advance his wrongful termination claims, asserting a plethora of perceived wrongs he suffered

[3] Nirala claims without reference to any authority that the FBI had his house under constant surveillance, hence had no reason to believe his child or any other person was present inside when they heard the noise in his basement as he coming up the basement stairs. This assertion, like so many others advanced by the defendant is false. Attachment 11 (FBI surveillance log showing only 3 hours and 20 minutes of coverage to confirm Nirala was at home the night before the scheduled execution of the arrest warrant by the FBI team). This attachment, like all the others have long ago been provided in discovery to Nirala's counsel.

while employed at NGA. During the roughly four years he worked at NGA (he says seven years, but his clearances were removed in January 2014 when the first classified documents relating to the national defense were recovered from his residence and he was hired in March 2009), Nirala filed over 100 Freedom of Information Act (FOIA) claims believing his supervisors were not advising him of all the advancement opportunities available in the agency. Today when facing very serious charges with taking highly classified documents relating to the national defense, Nirala asserts he was the victim of discrimination and retaliation while employed at NGA. However, Nirala is not charged with anything to do with his job performance, he is charged with taking clearly marked classified documents relating to the national defense home and lying about his mishandling of classified documents. The recovery of clearly marked classified materials inside his residence belie his assertions advanced in the instant filing. He is not the victim, rather Nirala has been caught hiding highly classified documents he unlawfully removed from SCIFs at NGA inside his residence, not once, but twice.

11. Nirala's filing could be understood to seek a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). However, Nirala "must make a substantial preliminary showing that a false statement knowingly and intelligently, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Id.* at 155-56 (quotations omitted). Here, while Nirala makes numerous assertions, he utterly fails to make any preliminary showing of false statements in the warrant affidavits. Law enforcement was only concerned with the recovery of classified material relating to the national security. Nirala's perceived employment issues do not address the unauthorized removal of Top Secret materials from NGA.

12. Nirala is not entitled to a *Franks* hearing if the Court even permits this filing in a case where he enjoys three appointed counsel. It is instructive that his attorneys have not filed a motion attacking the searches in this case. *United States v. Chandia*, 514 F.3d 365, 373 (4th Cir. 2008) (*Franks* hearing not required where motion to suppress made only "bare allegations," failing to make "substantial preliminary showing" by presenting "offer of proof" either in the form of "affidavits or sworn or otherwise reliable statements of witnesses" or by "satisfactorily explain[ing]" their absence); *United States v. Photogrammetric Data Services*, 259 F.3d 229, 237-38 (4th Cir. 2001) (*Franks* hearing not required where neither statements in affidavit, nor alleged omissions, "operated to defeat the sufficiency of the probable cause showing otherwise made or . . . so seriously undermined [the affiant's] credibility as to render [the probable cause showing] unreliable"); *United States v. Akinkoye*, 185 F.3d 192,199 (4th Cir. 1999) (*Franks* hearing not required where probable cause existed apart from alleged inconsistencies in affidavit); *United States v. Gray*, 47 F.3d 1359, 1364-65 (4th cir. 1995) (*Franks* hearing not required absent "substantial preliminary showing" that affiant made knowing and intentional false statements); *United States v. Jeffus*, 22 F.3d 554, 558 (4th Cir. 1994) (noting defendant's heavy burden in establishing the need for *Franks* hearing); and *United States v. Chavez*, 902 F.2d 259, 265 (4th Cir. 1990) (defendant must show that agent *affirmatively tried to mislead* magistrate to warrant *Franks* hearing; ambiguity or lack of clarity is insufficient).

13. Here, Nirala apologized to the first search warrant affiant after the FBI located and removed classified documents in his residence in 2014. *See* Attachment 3. The Chief United States Magistrate Judge in the District of Maryland authorized the 2014 search warrant of Nirala's residence. A different United States Magistrate Judge in this district authorized the

arrest warrant, based on an affidavit from the same affiant to whom Nirala previously apologized for having Top Secret documents in his residence in 2014. The FedEx box search warrant affidavit has an entirely different affiant. Each of the affidavits is today accurate. They involve both multiple judicial officers and different affiants. Nirala's personal assertions aside, at trial the government will prove that each of these Top Secret documents recovered from Nirala's residence relate to the national defense of the United States and were taken without authorization from his place of work in the Eastern District of Virginia. At its essence this is a simple possession case. The documents are marked and Nirala had them where they should not have been found.

14. When issuing a warrant and making a probable cause determination, judges are to use a "totality of the circumstances analysis." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). This standard "is not defined by bright lines and rigid boundaries. Instead, the standard allows a magistrate to review the facts and circumstances as a whole and make a common sense determination of whether 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Williams*, 974 F.2d 480, 481, (4th Cir. 1992) (quoting *Gates*, 462 U.S. at 238). Courts of Appeals review the magistrate judge's decision in this regard with great deference. *Id.*

a. Good Faith Reliance Upon a Warrant

15. For the sake of argument, even if the Court were to find that a search warrant was issued by the magistrate judge without probable cause, the "good faith" exception would apply. In fact, the Court could proceed directly to the "good faith" analysis without even first deciding the issue of probable cause. *Leon*, 468 U.S. at 897, 923-24 (1984); *see also United States v.*

Bynum, 293 F.3d. 192, 194-95 (4th Cir. 2002) (good faith analysis appropriate after assuming without deciding that no probable cause supported the warrant).

16. The main purpose behind the "exclusionary" rule is not the redress of any injury caused to the victim of an illegal search or seizure but the deterrence of future police misconduct. *United States v. Calandra*, 414 U.S. 338, 347-348 (1974). In *Leon*, the Supreme Court recognized that the application of the "exclusionary" rule was not suitable in situations where the police act appropriately with an objectively good faith reliance on a facially valid warrant. If there was no police misconduct, then the exclusionary rule should not apply because its intended goal of deterrence could not be met. In *Leon*, the Court found that if certain conditions were met, and the police searched an area with a facially valid warrant, then the evidence seized pursuant to that warrant should not be excluded. The conditions are summarized:

1. Was the magistrate given truthful information by the officer?
2. Did the magistrate exercise his/her duty by acting as a detached and neutral judicial officer?
3. Could the police reasonably presume the warrant to be valid?

Leon, 468 U.S. at 923. Thus, if the *Leon* conditions are met, a warrant can be saved even if it was defective under *Gates, supra*. Under the *Leon* test, courts can find objective good faith is lacking only when the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923; *see Bynum*, 293 F.3d at 195 (good faith found in case where defendant's identity is known, drug dealing is associated with the defendant, and affidavit is based, in part, on source information). The lack of "good faith" is found only in the most egregious situations.

17. In the instant case, the FBI agents were assured that the material on Nirala's unclassified email accounts was classified material relating to the national defense. The FBI

were entitled to properly rely upon that classification determine. At trial, the government will prove beyond a reasonable doubt that the documents were properly classified, in some cases by Nirala himself. In any regard, the FBI agents were entitled to rely in good faith upon those classification assessments by the experts who make those assessments. There is utterly no evidence of any bad faith by any agent in this case. Indeed, Nirala apologized to the agent who obtained the search warrant of his residence and his arrest warrant. Nirala evidentially did not perceive any bias or inappropriate behavior by that agent/affiant.

b. Exigent Circumstances and Plain View Doctrine

18. The FBI agents who took Nirala into custody on his basement stairs while executing the arrest warrant were allowed to confirm that no pet or person remained in the basement and to confirm the gas furnace had not been tampered with. When they heard the noise, heard his first response to hold on and later explanation he had been working on his furnace and saw the insulation on his clothing, the protective sweep of the unfinished basement to search for pets, his child or another adult or some other source of the noise was an appropriate step before leaving the residence with Nirala in custody. Upon spotting the FedEx box that had apparently just been hidden under the stairs, the agents appropriately took custody of it until they had the opportunity to come to a court for permission to search the box. Classified material could not be reasonable left behind in a house where forced entry had been made. Its placement in a SCIF pending the review by a judicial officer was reasonable.

19. Exigent circumstances permit the seizure and control of property while a search warrant is obtained. *United States v. Cephas,* 254 F.3d 488, 494-95 (4^{th} Cir. 2001). It is not necessary to prove that destruction or removal of evidence was imminent to justify the seizure

pending obtaining a warrant where exigent circumstances exist. *United States v. Grissett*, 925 F.2d 776, 778 (4th Cir. 1991). *Accord United States v. Moss*, 963 F.2d 673, 679-80 (4th Cir. 1992); *United States v. Reid*, 929 F.2d 990, 993-94 (4th Cir. 1991). Where a partially clothed defendant was taken into custody, courts have approved law enforcement officers making entry into a residence to obtain additional clothing. The Fourth Circuit, joining other circuits on the point, found a partially clothed defendant creates "an exigency justifying the officer's temporary reentry into the arrestee's home to retrieve clothes." *United States v. Gwinn*, 219 F.3d 326, 334 (4th Cir. 2000) (noting that there was an objective need to protect the defendant from injury, no evidence that reentry was pretexual, and only a "slight and temporary intrusion" for the limited purpose of retrieving shoes and shirt).

20. When the agents stepped into the basement to check whether the furnace had been tampered with and to determine the source of the noise they heard as they came down the stairs to arrest Nirala, they spotted the FedEx box overstuffed with files and partially duct taped beneath the basement stairs. The agents did not search the FedEx box, but seized it pending the drafting and review of an application for a search warrant by a judicial officer.[4] The box was maintained in a SCIF while the warrant was promptly sought.

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[4] *See also* "[T]he plain-view doctrine authorizes warrantless seizures of incriminating evidence when (1) the officer is lawfully in a place from which the object may be plainly viewed; (2) the officer has a lawful right of access to the object itself; and (3) the object's incriminating character is immediately apparent." *United States v. Jackson*, 131 F.3d 1105, 1109 (4th Cir. 1997) (*citing Horton v. California*, 496 U.S. 128, 136-37 (1990)). "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971).

21. FBI agents attempting to arrest Nirala heard him state “hold on, hold on” from inside the residence as they knocked and announced. After further knocking and commands to come to the door, the agents made entry and were unable to locate Nirala anywhere on the first level of his residence, including his garage. Only after opening what had been a closed basement door, did they discover Nirala coming up from the basement with insulation on his clothing. As they took custody of him, a noise in the unfinished basement was heard. Nirala said he had been working on his furnace when he did not come to the door despite hearing the agents knocking and directing him to open the door. A protective sweep of the unfinished basement was then conducted. The FedEx box under the basement stairs with insulation in close proximity was located. Having reason to believe the box contained classified information relating to the national security of the United States, the agents appropriately seized it and placed it unopened into a SCIF while they sought and obtained another search warrant.

Conclusion

22. This Court should reject the instant filing by a represented party in a criminal proceeding. Nirala has three court-appointed counsel, counsel who did not make a filing challenging the searches in this case. The case law does not support hybrid representation and the local rules do not contemplate it.

23. Nirala’s sixty-one page filing, with one hundred-and-forty-one pages of assorted attachments, seeks to inject his claim of wrongful conduct while he was employed at NGA into a criminal proceeding. Nirala’s own perception of the workplace environment in NGA is irrelevant to the indicted conduct. The issue to be resolved at trial is whether Nirala repetitively

removed clearly marked, classified documents at the Top Secret level, relating to the national defense from secure SCIFs at NGA and stored them in his own residence.

WHEREFORE, the government asks that the defendant's filing be rejected or in the alternative be denied as utterly failing to make any substantial preliminary showing of a false statement in any affidavit sworn before a federal judicial officer in this case.

Respectfully submitted,

Dana J. Boente
United States Attorney

By: ____________/s/______________
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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing government's opposition using the CM/ECF system, which will send a notification of such filing (NEF) on August 11, 2016, to the counsel of record. Government counsel is ethically prohibited from serving a represented party directly.

________/s/__________________

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